United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

No. 76-7631

In the

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ORECK CORPORATION, *Plaintiff-Appellee,* vs. **WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,** *Defendants-Appellants.*	Appeal from the United States District Court, Southern District of New York. — Honorable **Richard Owen,** Judge Presiding.

DEFENDANTS' JOINT BRIEF.

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Oral Argument Requested.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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15 U. S. C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition

with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U. S. C. § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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DEFENDANTS' JOINT BRIEF.

PRELIMINARY STATEMENT.

This is an anti-trust case under 15 USC § 1. It was tried to a jury before the Honorable Richard Owen in the United States District Court for the Southern District of New York.

ISSUES PRESENTED FOR REVIEW.

1. Did the trial court err in failing to direct a verdict for defendants when plaintiff failed to prove an unreasonable restraint of trade?
2. Did the trial court err in the admission of evidence as to conspiracy and in failing to direct a verdict for defendants when plaintiff failed to prove a conspiracy between them as to plaintiff?
3. Did the trial court err in failing to direct a verdict for defendants when plaintiff failed to prove that it was damaged by defendants' alleged acts?
4. Did the trial court err in the admission of evidence as to damages and in failing to direct a verdict for defendants when plaintiff's evidence was such that the jury could only speculate as to the amount of plaintiff's damage?

NATURE OF THE CASE.

This is an appeal from a judgment in favor of plaintiff-appellee, Oreck Corporation, a distributor of vacuum cleaners, against defendants-appellants, Whirlpool Corporation, a manufacturer, and Sears, Roebuck and Co., a retailer, based upon an alleged conspiracy to exclude Oreck from the market for the sale of vacuum cleaners in the United States and Canada in violation of Section 1 of the Sherman Act. (15 USC § 1.) Defendants' motions for directed verdicts at the close of the plaintiff's case and at the close of all the evidence were denied. (Tr. 1325-1373, 1627-1650.) The jury found for plaintiff and assessed damages (before trebling) at $675,000 on Count I and $75,000 on Count II.* (A. 957-958.) The court trebled the verdict pursuant to statute (15 USC § 15) to $2,250,000 and awarded plaintiff $125,000 in attorneys' fees and $5,000 costs. (A. 37-39, 45-46.) Defendants' post-trial motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial were denied. (A. 40-44.) This appeal follows.

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* Count I relates to the alleged exclusion of Oreck from the United States market and Count II from the Canadian market. Count III alleging a conspiracy to prevent Oreck sales to Whirlpool employees in violation of 15 USC § 1, Count VI seeking an injunction against alleged anti-competitive acts, and Count VII seeking Sears' divestiture of its less than 5% stock interest in Whirlpool pursuant to 15 USC § 18, were voluntarily dismissed by Oreck. The Court directed a verdict in favor of Whirlpool and Sears at the close of plaintiff's case as to Counts III and IV alleging violations of the Robinson-Patman Act, 15 USC § 13.

STATEMENT OF FACTS.

Defendant, Whirlpool Corporation (hereinafter "Whirlpool"), is a Delaware corporation with its principal place of business in Benton Harbor, Michigan. It is a well-known manufacturer of a broad range of household appliances, including washing machines, clothes dryers, refrigerators, freezers, garbage disposers, dishwashers, and air conditioners sold under the "Whirlpool" brand and distributed by independent appliance distributors and factory branches to appliance dealers and department stores. (PX 13.) It also manufactures most of the above products for sale to defendant Sears, Roebuck and Co. (hereinafter "Sears"), under the Kenmore or Coldspot label. Sears is a New York corporation with its principal place of business in Chicago and is the owner of less than 5% of Whirlpool's stock. (A. 323.) An officer of Sears serves on the Whirlpool Board. (A. 333-335.)

In 1957, Whirlpool entered the vacuum cleaner field through the acquisition of Birtman Electric Co., which had previously manufactured vacuum cleaners for sale to Sears under the Kenmore label. (A. 323.) Whirlpool continued this business. (A. 57.) Starting in 1957, it also manufactured vacuum cleaners for sale to distributors under the "RCA-Whirlpool" brand.* (Tr. 652-656.) Whirlpool's distribution of vacuum cleaners under its own brand name was unsuccessful and unprofitable so, in 1961, it discontinued this part of its business. (A. 57, Tr. 655-656.) Its lack of success in marketing vacuum cleaners through its usual channel of distribution was due to the fact that vacuum cleaners, as compared to washing machines and

* At that time, Whirlpool was licensed to use RCA's name. That license was later terminated for reasons irrelevant to this case. Accordingly, Whirlpool's brand will be referred to hereinafter as "Whirlpool" whether or not the RCA authority was in effect at the time under discussion.

similar products which its distributors were accustomed to selling, are low priced items. Its distributors could make more money selling these major appliances, and therefore devoted little time and effort to selling vacuum cleaners. (PX 13, Tr. 652-653.)

In 1963, Whirlpool decided to resume the manufacture of vacuum cleaners for sale under the Whirlpool brand name, but decided to market them and other products that it hoped to develop through a new channel of distribution which would give it access to major dealers in the country, such as department stores and other key retail accounts. (PX 13, A. 470-471, 473.)

In April, 1963, Jack Sparks, Whirlpool's Vice President, contacted plaintiff's founder, David Oreck (A. 49, 469), who had previously been in charge of vacuum cleaner sales for Bruno New York, but was then unemployed. Bruno had been the most successful of Whirlpool's distributors in selling Whirlpool brand vacuum cleaners prior to 1961. (A. 50-51, 54-55, 466, Tr. 502-503.) Sparks outlined Whirlpool's plan. He indicated Whirlpool's willingness to appoint Mr. Oreck its exclusive United States distributor for Whirlpool brand vacuum cleaners if Mr. Oreck would undertake the entire responsibility for implementing the new distribution concept. (PX 13, A. 56-58, Tr. 640-641.) Mr. Oreck accepted and, thereafter, plaintiff, Oreck Corporation, a New York corporation (hereinafter "Oreck"), was organized as the vehicle through which he would fulfill his new responsibilities. (A. 49.)

On August 7, 1963, Oreck Corporation and Whirlpool entered into a contract (PX 3) which provided in pertinent part that Oreck Corporation would be designated as Whirlpool's exclusive distributor for the United States and its possessions of Whirlpool brand portable home vacuum cleaners (Par. 2), that the agreement would have an initial term of five years from the date upon which the first 500 vacuum cleaners were shipped to Oreck* (Par. 1; DX F), and that after the initial five year period

* By March 13, 1964, the first 500 units had been shipped. Thus, the initial 5-year term ran from March 13, 1964 to March 13, 1969. (A. 99-100.)

the agreement would continue for successive one-year terms subject to the right of either party to cancel by giving at least six months notice prior to expiration of the initial term or any subsequent one-year additional term. (Par. 1.) The agreement also specified that Oreck would purchase certain minimum quantities during the term of the agreement. (Par. 2.)

Some of the tools to be used by Whirlpool to make the vacuum cleaners and attachments were owned by Sears. Sears authorized the use of its tools to produce products for sale to Oreck in exchange for which it received a tool rental fee. (A. 330, 332, 474, 656-657, 862-863.)

Whirlpool initially manufactured two canister-type vacuum cleaners and an attachment for Oreck. (Tr. 504-505.) In 1965, it also began producing upright vacuum cleaners for Oreck. (Tr. 505.) Oreck experienced difficulty selling the Whirlpool canister models and their manufacture was discontinued in 1968. Oreck then arranged to purchase canister-type vacuum cleaners from another manufacturer, Mastercraft, while Whirlpool continued to manufacture and sell to Oreck attachments for the Mastercraft canisters, as well as upright vacuum cleaners. (Tr. 506-508, A. 410, Tr. 510-511.)

When Oreck Corporation first began operations, it concentrated its efforts upon sales to department stores in accord with the objectives originally agreed to by David Oreck and Whirlpool. (A. 785-786.) By the end of 1965, however, Oreck had changed its marketing strategy by moving away from department stores, and placing its primary emphasis upon sales to janitorial supply houses, hotels and motels. (A. 498, 578, 769, Tr. 738.)

In June, 1966, Whirlpool's Vice President Sparks received a memorandum (PX 45) from Whirlpool's President, John Platts,

in which Platts noted that Whirlpool's original objective, the new method of distribution, which could be used for vacuum cleaners and other products, had virtually disappeared. He noted there had been a shift of emphasis by Oreck away from department stores toward commercial sales areas giving rise to concerns about product quality and life endurance.* He stated that Whirlpool had to maintain its perspective as to why it was originally interested in the Oreck program and should consider how much of management's attention could be justified for the profit involved. At that time, Oreck was purchasing approximately 16,000 units per year. (PX 158.)

In September, 1966, Sol Sweet, one of Sparks' subordinates, met with plaintiff's chief officer, David Oreck, in an effort "to put them back on the track" (A. 769-770), to get plaintiff's primary sales effort redirected toward the department stores and other key retail accounts which had been the parties' agreed objective. (A. 784.) David Oreck told Sweet that it was "easier" to sell through channels of distribution other than department stores, and indicated that plaintiff's sales efforts would not be redirected.** (A. 770.) After this meeting, Sweet recommended to Sparks that Whirlpool terminate its agreement with plaintiff at the end of its initial five year term. (A. 771-772.)

In 1967, Oreck Corporation again shifted its marketing strategy. (A. 303-306, 407-408, 598.) It began a direct mail campaign to consumers using the fact that it had sold Whirlpool vacuum cleaners to hotels and motels as a "come on." It sent out ads such as PX 60 which stated that America's major hotels and institutions used the Whirlpool vacuum cleaners for which they paid full price, but that for a limited time, the consumer could purchase a machine at half price because the consumer was a member of some special group, such as "real estate executives,"

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* The Whirlpool brand vacuum cleaners were engineered for home and not commercial use. (Tr. 738.)

** Shortly thereafter, Oreck Corporation abandoned all efforts to sell to department stores and major retail accounts. (A. 206, 306.)

"industrial executives," or a "consumer test group." (PX 60, A. 307-308.) Actually there were no special groups, this was not a "special price" and it was not available only for a limited time. Practically the entire population fell into one or another of the "special groups" and Oreck mailed the same "limited time offer" to the same consumers as many as ten times a year. (Tr. 496-497.)

Oreck's direct mail advertising with its so-called "limited time half price offer" engendered complaints first from Oreck's janitorial supply dealers who had stocked the vacuum cleaners and were being undersold by Oreck itself (A. 439-440), and later from consumers who questioned Oreck's representations. (A. 458.) Whirlpool was displeased both with the contents of the mailers, and with Oreck's utter refusal to develop the avenue of distribution Whirlpool desired and which was the basis for giving Oreck the distributorship. (A. 208-209, Tr. 1409-1410.) Sparks and Sweet both told Mr. Oreck that he should get back to their original objective (A. 501-505)* and Sweet warned Oreck that its distributorship might be terminated. (A. 774-775.) Nevertheless, direct mail received an increasing sales emphasis thereafter. (A. 304-306, 407-408, 598.)

In January, 1968, Sparks again warned plaintiff of possible termination (DX I), and on June 27, 1968, Oreck was formally notified by Whirlpool of Whirlpool's decision to terminate the agreement at the end of its initial 5-year term, March 13, 1969.** (DX F, A. 804.)

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* As Sparks testified on examination by plaintiff's counsel:

Q. "Can't we at least agree on this, that both you and Sweet were against it [mail order] while Oreck was for it? Can we agree to that?

A. We were for the distribution that we had originally planned. We weren't against anything. We were for something." (A. 506.)

** In addition to its failure to establish the type of distribution system originally envisioned by Whirlpool, Oreck's volume was so low that the business was unprofitable for Whirlpool. (A. 512-

(Footnote continued on next page)

Plaintiff's president, David Oreck, complained that he would lose all of his investment, contended that he had done a good enough job to be retained, and threatened litigation if Whirlpool adhered to its decision. (A. 171-172, 176-177.) He asked that Oreck Corporation be allowed to continue as a distributor for just three years so that he could get his investment back. (A. 430-431, Tr. 1433.)

Whirlpool acquiesced in this request and the parties reached a new agreement. The original 1963 contract was replaced by a new one dated August 1, 1968 (PX 44), which provided that the agreement would continue until December 31, 1971, *"at which time this Agreement shall expire."* (PX 44, par. 1.) There was no provision for renewal under this agreement.*

After execution of the new agreement, Oreck continued and intensified its direct mail solicitation. (A. 304-306, 407-408, 598.) Its ads continued to engender numerous complaints from consumers. (A. 458.) Whirlpool received a complaint from the Better Business Bureau concerning Oreck's tactics which was particularly embarrassing to Whirlpool because its Chairman of the Board was the President of the national Better Business Bureau. (A. 459-460.) An honorary director of Sears received an Oreck solicitation in the mail which he gave to Mr. Boyar, a Vice President of Sears and a director of Whirlpool. Boyar transmitted the letter to Mr. Ranum of Whirlpool who referred it to John Platts, Whirlpool's president, with this note:

> "We got a letter from Sid Boyar in which he forwarded a letter from an old friend of Whirlpool who had received an Oreck offer and also thought this type of selling would give Whirlpool a bad name." (PX 60, A. 830-831.)

(Footnote continued from preceding page.)
513.) As of May, 1968, Whirlpool had shipped an aggregate of only 58,312 vacuum cleaners and attachments to Oreck in more than four years. (PX 46.) This was almost 12,000 fewer units than the minimum required by the agreement. (PX 3, 46.)

* Pursuant to the Agreement, plaintiff, represented by counsel, gave Whirlpool a general release, dated September 10, 1968. (PX 44, DX H, A. 180, 432-437.)

Although the purpose of the Oreck arrangement was to promote the Whirlpool brand name on vacuum cleaners, Oreck, on occasion, asked Whirlpool to manufacture a vacuum cleaner and attachment under a private label without the Whirlpool name. Whirlpool declined. So Oreck sold Whirlpool vacuum cleaners to a customer which pasted its own label over the Whirlpool name. (A. 262-263, 634.)

Plaintiff sold vacuum cleaners in the United States and also Canada (PX 39, A. 118-119, 150-151, 154-155, 416-418), and from time to time, requested that Whirlpool obtain Canadian Standards Association (CSA) approval for the vacuum cleaners. (A. 130, 144.) Such approval by CSA in Canada is analogous to approval by Underwriters Laboratories (UL) in the United States and is not legally required in order to sell in Canada. (A. 129-132.) Whirlpool did not obtain CSA approval for the upright vacuum cleaners (A. 131.)

To obtain CSA approval for the attachment which Whirlpool manufactured for use by Oreck with the Mastercraft canister, the attachment and the canister had to be submitted to CSA, as a unit, by Mastercraft. (DX G.) Mastercraft never submitted the unit to CSA. After the agreement with Whirlpool expired and Oreck obtained a new source for upright vacuum cleaners, the new product was not submitted to CSA for approval. (A. 421-423.) In short, neither Whirlpool nor any of Oreck's other suppliers obtained CSA approval of the products they sold to Oreck. Oreck also requested certain special packaging which Whirlpool declined to furnish. (A. 599 *et seq.*)

Sears did not know of these requests by Oreck for a private label, for CSA approval or special packaging, or of Whirlpool's reactions to those requests. (A. 766 *et seq.*, 800-884.)

On May 14, 1971, after plaintiff indicated that it was looking forward to continuing as Whirlpool's distributor after the contract expired according to its terms (PX 55), plaintiff was given formal written notice that Whirlpool did not intend to

change its 1968 decision to allow the agreement to expire on December 31, 1971. (PX 96.)

Thereafter, in July, 1971, Oreck Corporation began to order huge quantities of merchandise far in excess of its forecasts or any previous orders. (PX 99.) Whirlpool suggested that Oreck reduce its orders, but Oreck insisted that it would take everything it ordered. (PX 99, 100, A. 295-296.) Whirlpool therefore agreed to and did manufacture all of the vacuum cleaners ordered with the written understanding that they would have to be shipped and invoiced by December 31, 1971. (PX 101, A. 441.) As that deadline approached, Whirlpool repeatedly asked Oreck for shipping orders, but to no avail. (PX 102, DX N.) Whirlpool had 21,800 unshipped upright vacuum cleaners and 8,000 attachments on hand when the contract expired. (A. 518, 521.) Oreck also had an extensive inventory of Whirlpool vacuum cleaners which it continued to advertise and sell throughout 1972. (A. 445-447, 887.) In fact, David Oreck testified that Oreck Corporation may have had Whirlpool vacuum cleaners in inventory as late as December, 1973. (A. 447.)

When its agreement with Whirlpool expired on December 31, 1971, Oreck Corporation had exceeded its line of credit with Whirlpool ($200,000). It owed Whirlpool more than $220,000 for vacuum cleaners shipped prior to December 31, 1971, which it persistently refused to pay. (A. 442-443, 580, 586-587.) Whirlpool was finally compelled to institute a collection suit against Oreck in the New York Supreme Court. Whirlpool obtained a judgment against Oreck which was sustained on appeal. (A. 443.)

In 1972, after the Whirlpool contract terminated, Oreck obtained another supplier for upright vacuum cleaners which it considered superior to those previously supplied by Whirlpool, and which it has sold in increasing numbers ever since. (A. 408-409, 887-889.)

Although this case is premised upon, and the jury found that the actions complained of were not unilaterally taken by Whirlpool but were the result of a conspiracy between Whirlpool and Sears (A. 957-958), the record does not contain one iota of testimony of any conversation between a representative of Whirlpool and a representative of Sears relating to the termination of Oreck. It does not contain one iota of evidence of any conversation between a representative of plaintiff and a representative of Sears, relating to the termination of Oreck. Every witness from Whirlpool who was involved in the termination—Messrs. Sparks, Sweet and Steeb—testified unequivocally that they never consulted with Sears concerning Oreck nor did Sears have anything to do with the decision to terminate Oreck. (A. 766 *et seq.*, 800 *et seq.*, 845 *et seq.*) Likewise, Whirlpool employees who dealt with Sears in connection with the sale of vacuum cleaners by Whirlpool to Sears—Messrs. Whitman and Wardeburg—testified unequivocally that Sears never made any complaints concerning the sale of vacuum cleaners to Oreck and that Sears was not involved in any way in the termination of Oreck. (A. 872 *et seq.*, 880 *et seq.*) Sears'personnel charged with the purchase of vacuum cleaners—Messrs. Smith, Danhauer and Harper—testified unequivocally that they at no time objected to the sale of vacuum cleaners by Whirlpool to Oreck, that they did not communicate with Whirlpool concerning its relationship with Oreck, that they had no part in the decision to terminate Oreck and that they learned of the termination only after it had occurred. (A. 835 *et seq.*, 860 *et seq.*, 866 *et seq.*) Mr. Boyar, a Sears Vice President who also served as a Director of Whirlpool, testified that Sears neither suggested, requested nor was it in any way involved in the Oreck termination. (A. 828 *et seq.*) Likewise, the record does not contain one document disclosing any involvement by Sears in the Oreck termination.

The only involvement of Sears in the entire Oreck matter was its authorizing Whirlpool to use Sears tools to make vacuum cleaners for Oreck (A. 862-863), and the transmission by Mr.

Boyar to Whirlpool of one of Oreck's "limited time half-price offers", received by an honorary director of Sears who opined that Oreck's direct mail advertising would have an adverse effect on Whirlpool. (PX 60, A. 830-831.)

Over objection, David Oreck was permitted to testify to two conversations with a Whirlpool salesman, John Payne. Through this testimony, plaintiff sought to tie Sears into Whirlpool's unilateral decision to cease its business relationship with Oreck. Mr. Oreck testified that in late 1967, Payne, who had no policy-making responsibility (A. 577) and no contact with Sears, told him "that some people around his place had received the mail and . . . that I ought not to rock the boat . . . [and] He suggested that we should not do mailing because the people didn't like it," and stated that "people" means the "other customer." (A. 207.)

Over objection, Mr. Oreck also testified that in June, 1968, after he received notice of the termination, he called Mr. Payne and asked him what happened, and where he (Oreck) went wrong, and that Payne stated that "I *think* our other customer got to the head of the company." (A. 175.)

No evidence was offered as to the source of or the basis for Payne's conclusion, and on cross-examination Mr. Oreck admitted that Payne did not know the reason for the termination, but was merely making an assumption. (A. 437-439.)

Finally, the record shows that in Oreck's last four years as a Whirlpool distributor it sold 160,490 vacuum cleaners and attachments. (PX 106.) In the four years following termination of its distributorship, Oreck sold 189,776 vacuum cleaners and attachments. (A. 885-889.)

ARGUMENT.

I.

PLAINTIFF FAILED TO PROVE AN UNREASONABLE RESTRAINT OF TRADE.

It is well settled that "the antitrust laws were enacted for the protection of *competition, not competitors," Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, ... U. S. ....., 45 L. W. 4138, 4141 (1977); *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 320 (1962) and that they do not proscribe all conspiracies, but only those that *unreasonably* restrain trade. *Standard Oil* v. *United States,* 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911); *Northern Pac. Ry. Co.* v. *United States,* 356 U. S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). It is likewise well settled that the burden of proving both a conspiracy *and* that it unreasonably restrained trade rests upon plaintiff. *Beckman* v. *Walter Kidde & Co., Inc.*, 316 F. Supp. 1321, 1324 (E. D. N. Y. 1970), *aff'd.* 451 F. 2d 593 (2d Cir. 1971), *cert. denied,* 408 U. S. 922 (1972); *Diehl & Sons, Inc.* v. *International Harvester Co.*, 1976-2 Trade Cases ¶ 61,180 (E. D. N. Y. 1976). Oreck did not meet that burden.

As will be shown in the next section of this brief, there is no competent evidence in the record that Whirlpool and Sears conspired to exclude Oreck from the vacuum cleaner market. However, assuming, *arguendo,* the existence of a conspiracy, plaintiff has totally failed to prove an unreasonable restraint of trade resulting therefrom. The law is crystal clear that the mere agreement of a manufacturer with a third party to give the third party an exclusive distributorship is not illegal, even if the agreement results in terminating another competing distributor. And this is true whether the terminated distributor claims to have been or even if it was, in fact, a good distributor.

United States v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 380-381, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967). As stated in *Alpha Distributing Co. of California* v. *Jack Daniel Distillery*, 454 F. 2d 442, 452 (9th Cir. 1972):

> "It is not a *per se* violation of the antitrust laws for a manufacturer or supplier to agree with a distributor to give him an exclusive franchise, even if this means cutting off another distributor. Moreover, without more, it is not a *per se* violation for the manufacturer or supplier to combine or conspire with others to make a change in its exclusive franchises, cutting off the supply of a former distributor. . . . The critical inquiry in such 'refusal to deal' cases is not whether there was a refusal to deal, or whether a refusal to deal was carried out by agreement with others, but rather whether the refusal to deal, manifested by a combination or conspiracy, is so anti-competitive, in purpose or effect, or both, as to be an unreasonable restraint of trade." (Citations omitted.)

In *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir. 1957), *cert. denied* 355 U. S. 822 (1957), an automobile manufacturer terminated two of three competing Packard dealers in Baltimore because of the demand of the third that it be given an exclusive distributorship. The court found that there was no antitrust violation as a matter of law, stating, at page 420:

> "When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality'. . . ."

In *Bay City-Abrahams Bros., Inc.* v. *Estee Lauder, Inc.*, 375 F. Supp. 1206 (S. D. N. Y. 1974) the defendant cosmetic manufacturer terminated the plaintiff department store as a distributor for its cosmetics and gave the exclusive distribution to a competing department store. The court granted summary judgment in favor of the manufacturer notwithstanding the fact that the court assumed a conspiracy between the manufacturer and the new distributor. The court stated, at page 1215:

> "Assuming *arguendo* that defendant's refusal to deal with plaintiff was not unilateral, as defendant contends, but, rather, the product of an arrangement with Weichmann's, [sic] such agreement, standing alone, would continue to be an insufficient predicate for a Section One claim. If proved, such agreement might tend to demonstrate a rationale for defendant's conduct; to eliminate plaintiff as Wiechmann's competitor in the involved geographical area. But the existence of such agreement would not, of itself be sufficient to establish that defendant's motive for refusing to deal with plaintiff was anticompetitive and in unreasonable restraint of trade."

In *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71 (9th Cir. 1969), *cert. denied* 396 U. S. 1062 (1970), the defendant distiller terminated plaintiff's distributorship after the co-defendant refused to distribute the distiller's products unless plaintiff was terminated. The Court reversed a judgment for plaintiff.

See also, *E. A. Weinel Construction Co.* v. *Mueller Co.*, 289 F. Supp. 293 (E. D. Ill. 1968), in which defendant's other distributors pressured it to terminate plaintiff's distributorship, which was not thereafter given to another. The Court granted summary judgment to the defendant.

To the same effect are: *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F. 2d 1093 (3d Cir. 1972) (summary judgment for defendant manufacturer of dental products which terminated plaintiff's distributorship in order to give exclusive distribution to another by agreement); *Burdett Sound, Inc.* v. *Altec Corp.*, 515 F. 2d 1245 (5th Cir. 1975) (summary judgment for manufacturer of sound equipment which terminated its distributor by agreement with another); *Bushie* v. *Stenocord Corp.*, 460 F. 2d 116 (9th Cir. 1972) (manufacturer of recording equipment terminated plaintiff pursuant to agreement to substitute another in plaintiff's place); *Scanlan* v. *Anheuser-Busch, Inc.*, 388 F. 2d 918 (9th Cir. 1968), *cert. denied* 391 U. S. 916 (1968) (brewer terminated beer distributorship by

agreement with another distributor); *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F. 2d 283 (6th Cir. 1963), *cert. denied* 375 U. S. 922 (1963) (brewer terminated plaintiff's beer distributorship by agreement with another); *Universal Brands, Inc.* v. *Philip Morris, Inc.*, 546 F. 2d 30 (5th Cir. 1977) (summary judgment for defendant where it terminated plaintiff's distributorship by agreement with another); *Eastcoast Equipment Co.* v. *Harnischfeger Corp.*, 354 F. Supp. 335 (E. D. Pa. 1973) (no antitrust violation where equipment manufacturer terminated distributor by agreement with another).

In *United States* v. *Topco Associates*, 405 U. S. 596, 607; 31 L. Ed. 2d 515, 525, 92 S. Ct. 1126 (1972), the Supreme Court of the United States set forth guidelines for determining whether a restraint is reasonable or unreasonable. It stated:

> "An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."

See also *Moraine Products* v. *ICI America, Inc.*, 538 F. 2d 134, 146 (7th Cir. 1976). Application of this test to the facts in this case can lead only to the conclusion that neither the purpose nor effect of the termination of Oreck was anti-competitive and that the termination did not unreasonably restrain trade as a matter of law.

As to the first two considerations set forth in *Topco, supra*, the facts peculiar to the business and the nature of the restraint and its effect, the record uncontrovertibly discloses that before Oreck Corporation was formed, during its term as a Whirlpool distributor, and thereafter, there were more than twenty companies engaged in the manufacture of vacuum cleaners, including such well-known names as Hoover, Eureka and Electrolux. (PX 108, A. 878-879.) In the four years preceding the expiration of Oreck's distributorship, these manufacturers shipped an average of 7,285,500 vacuum cleaners per year (PX 107) while

Oreck's sales during the same period averaged 40,122 vacuum cleaners per year. (PX 106.) In the four years following the expiration of Oreck's distributorship (1972-1975), the industry shipped an average of 8,340,500 vacuum cleaners per year (PX 107) while Oreck sold an average of 47,444 vacuum cleaners per year. (A. 885-889.) It is therefore readily apparent that on an average, following the expiration of Oreck's distributorship agreement, both the industry and Oreck itself sold more vacuum cleaners than before. The expiration of its agreement with Whirlpool neither foreclosed Oreck from the marketplace nor did it have an effect on competition in general.

The record discloses not only statistics revealing a competitive and unrestrained marketplace, but it clearly discloses that alternative sources were available to Oreck both during its Whirlpool distributorship and thereafter, and the ease with which Oreck switched sources. When Oreck was unable to successfully market and Whirlpool ceased manufacturing canister vacuum cleaners in 1968, Oreck readily obtained a new source for canisters, Mastercraft. It continued to sell Mastercraft canisters during the remainder of its agreement with Whirlpool and thereafter. (A. 410-411.) When the Whirlpool agreement expired on December 31, 1971, Oreck obtained another source of supply for upright vacuum cleaners which it regarded as superior to those which it purchased from Whirlpool. (A. 408-409, 887-889.)

Thus, Oreck's own evidence demonstrated not a restrained but a viable marketplace, and the availability of many competitive and alternative products to the consumer and to Oreck itself.

Where as here equivalent products remain available in the marketplace, it has uniformly been held that there can be no unreasonable restraint. *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 381, 18 L. Ed. 2d 1249, 1261, 87 S. Ct. 1856 (1967).

In *Elder-Beerman Stores Corp.* v. *Federated Dept. Stores, Inc.*, 459 F. 2d 138, 146 (6th Cir. 1972) plaintiff alleged that

as a result of a conspiracy between defendants, it could not obtain certain brands of merchandise for its store. Plaintiff failed to show that other alternative brands were unavailable to it. The court reversed a jury verdict for plaintiff, stating:

> "We intepret the 'rule of reason' as meaning that the granting of exclusive selling rights or acceptance of such exclusive selling rights, acts which are not prohibited by law unless there is a resulting foreclosure of market alternatives cannot, without proof of such foreclosure, form the basis for a jury verdict that the defendants had entered into a conspiracy to restrain trade."

In *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F. Supp. 703, 705 (S. D. N. Y. 1969), plaintiff alleged that Hallmark refused to sell its line of greeting cards to plaintiff because Hallmark had an exclusive distributorship agreement with the co-defendant, Stationers. The court refused to find an unreasonable restraint of trade, stating:

> "There is no claim here that there is not a substantial market for the sale of cards produced by Hallmark's competitors. There is nothing indicating that saleable lines of other greeting card manufacturers are not fully available to the plaintiff. Thus, the complaint does not allege that interbrand competition is affected in any way by the Hallmark exclusive distributorship arrangements with Stationers. The complaint fails to state a claim for violation of the Sherman Act."

And, in *Eastcoast Equipment Co.* v. *Harnischfeger Corp.*, 354 F. Supp. 335 (E. D. Pa. 1973) defendant notified plaintiff that its distributorship of heavy equipment would be terminated. After receipt of this notice, plaintiff, as Oreck here, readily obtained another supplier and continued to sell competitive products thereafter with ever increasing success. The court assumed that the termination resulted from an agreement with another of defendant's distributors, but, nevertheless, refused to find a violation of the antitrust laws.

The record in the instant case shows that there was in fact a substantial market for the purchase and sale of vacuum cleaners after Oreck's termination by Whirlpool, that other vacuum cleaner suppliers were available to Oreck, that Oreck purchased from other manufacturers, and that Oreck remained active in the vacuum cleaner market and was not foreclosed therefrom.

The *Topco* case, *supra,* also requires analysis of the history of the alleged restraint and the reasons for its adoption. This has been thoroughly discussed in the statement of facts. It suffices to say here that the record establishes Whirlpool's desire to create a new channel of distribution for its vacuum cleaners to department stores and major retail accounts, that Oreck agreed to develop this new channel of distribution for Whirlpool and then reneged in favor of another channel of distribution which it thought was easier. Oreck was repeatedly asked to get back on the track and to adhere to the objectives to which it and Whirlpool agreed. Oreck steadfastly refused. Instead, it directed its efforts to direct mail solicitations of questionable validity and legality.* It was after all hope of achieving its objectives in the Oreck program had been destroyed that Whirlpool sought to exercise its right to terminate Oreck's distributorship at the end of the initial five-year period in 1969.

Oreck pleaded, threatened and cajoled Whirlpool into extending the distributorship until December 31, 1971. Whirlpool supplied products to Oreck until that date. When the agreement with Whirlpool expired in 1971, Oreck refused to pay its bill and Whirlpool was compelled to sue Oreck. Surely, nothing in the law required Whirlpool to endure a further relationship with Oreck under the circumstances in this case.

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* Oreck's dubious "limited time-half price offers" may have been illegal under 15 USC § 45(a). Federal Trade Commission, *Guides Against Deceptive Pricing,* § 233.1; *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112 (1937); *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U. S. 374, 387 (1965); *Harsam Distributors, Inc.* v. *Federal Trade Commission,* 263 F. 2d 396 (2d Cir. 1959).

Even if, contrary to the facts, Whirlpool's decision not to sell to Oreck after the contract expired on December 31, 1971, was made pursuant to an agreement with Sears, such decision and action did not, under the rationale and holdings of *Topco* and the other cases cited above, result in an unreasonable restraint as a matter of law and for this reason alone the judgment below cannot stand.

II.

PLAINTIFF FAILED TO PROVE A CONTRACT, COMBINATION OR CONSPIRACY AS REQUIRED BY 15 U. S. C. § 1.

Both Count I and Count II are premised on section 1 of the Sherman Act and allege a conspiracy between Whirlpool and Sears to exclude Oreck from the United States and Canadian vacuum cleaner markets respectively. While a conspiracy may be proved by circumstantial evidence, a finding of conspiracy may not be based, as was the finding here, on speculation or conjecture. *Rushing* v. *MGM Distributing Corp.*, 214 F. 2d 542 (5th Cir. 1954); *Ramsey* v. *United Mine Worker's of America,* 265 F. Supp. 388 (E. D. Tenn. 1967), *aff'd* 416 F. 2d 655 (6th Cir. 1969), *rev'd on other grds,* 401 U. S. 302 (1971).

Every witness from Whirlpool who was involved in the termination of Oreck and every witness from both Whirlpool and Sears who was involved in the sale by Whirlpool of vacuum cleaners to Sears testified unequivocally that Sears at no time protested the sale of vacuum cleaners to Oreck and that Sears had nothing to do with the termination of the relationship. They testified that Sears had no knowledge of, much less did it participate in, any other decisions of Whirlpool relating to Oreck or the Oreck relationship.

In support of the charge of conspiracy, David Oreck was permitted to testify, over objection, to two statements allegedly made by John Payne. Payne was a Whirlpool salesman who had no responsibility for matters of corporate policy (A. 577), and no responsibility for sales to Sears. He had no contacts with

Sears. This testimony was inadmissible against Whirlpool (and by no stretch of the imagination could it be said to bind Sears) because the statement of a corporate agent is not admissible as an admission binding the principal unless it is shown that he had express authority to make the statement, or that it was within the scope of his authority. *Restatement Second of Agency* § 286, Comment (b); *Sladen* v. *Girltown, Inc.*, 425 F. 2d 24 (7th Cir. 1970); *United States* v. *A Motion Picture Film Entitled "I am Curious-Yellow"*, 285 F. Supp. 465 (S. D. N. Y. 1968), *rev'd on other grds*, 404 F. 2d 196 (2d Cir. 1968); *In Re Hyde's Estate*, 177 Misc. 666, 31 N. Y. S. 2d 497 (1941); *Kalamazoo Yellow Cab Co.* v. *Sweet*, 363 Mich. 384, 109 N. W. 2d 821 (1961); *Albertson* v. *Chicago, M., St. P. & P. R. Co.*, 242 Minn. 50, 64 N. W. 2d 175 (1954). Authority to make binding admissions is not assumed from the fact of employment alone, but must be affirmatively proven. *Restatement Second of Agency* § 288(2); *McCormick on Evidence* § 267 (3d ed. 1972); *Schner* v. *Simpson*, 286 App. Div. 716, 146 N. Y. S. 2d 369 (1955); *Weldner* v. *Whitman*, 18 App. Div. 2d 765, 235 N. Y. S. 2d 103 (1962); *Schlick* v. *Berg*, 205 Minn. 465, 286 N. W. 356 (1939).

In *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368, 385 (9th Cir. 1957), *cert. denied*, 355 U. S. 835 (1957), a treble damage action based on an alleged conspiracy to exclude plaintiff from the market for acoustical tiles, plaintiff was permitted to testify as to statements of defendant's salesman, whose duties and responsibilities were much the same as Payne's, to the effect that other Flintkote customers had complained about plaintiff being in the acoustical tile business. The court held that these statements were improperly admitted because, as here, "(t)here was an utter lack of proof of or questioning seeking to establish [the salesman's] authority to speak on behalf of Flintkote."

No authority was shown in the case at bar for Payne to speak for Whirlpool with respect to Sears, much less to bind Sears.

Even if it could be said that Payne was authorized to speak for Whirlpool, his testimony does not prove a conspiracy, because

a conspiracy cannot be shown simply by the actions or statements of Whirlpool. There must be proof of acquiescence or agreement by Sears, and here the record is void of any statement by or action of Sears from which it could be inferred that Oreck was terminated pursuant to a conspiracy or agreement between Whirlpool and Sears.

Moreover, through David Oreck's testimony of a 1967 conversation with Payne four years before Oreck's distributorship came to an end (A. 207), plaintiff at most elicited the fact that Sears disliked Oreck's mailer and expressed its feelings to Whirlpool. But such evidence, even if it was admissible, does not support an inference of conspiracy. Such testimony would not support such an inference even if Sears was simply a customer of Whirlpool, for it is well established that complaints by customers about another customer's practices do not support an inference of conspiracy under Section 1 because that is the normal working of the marketplace. *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.*, 289 F. Supp. 584, 588 (S. D. N. Y. 1968); *Garrett's, Inc.* v. *Farah Manufacturing Co. Inc.* 412 F. Supp. 656, 660 n. 3 (D. S. C. 1976).

But Sears was not simply a customer of Whirlpool. It was also a shareholder of Whirlpool. (A. 323.) As a shareholder, it had every right to call Whirlpool's management's attention to plaintiff's "limited time half price offers" which it believed were detrimental to Whirlpool's interests.

Even if it could be said that two inferences could be drawn from Sears' reaction to the Oreck mailers, one indicating illegality and the other legality, the law will not assume the illegal, but rather the legal interpretation. *Pattee* v. *Riggs National Bank of Washington, D. C.*, 124 F. Supp. 552, 554 (D. D. C. 1954), *aff'd* 218 F. 2d 867 (D. C. Cir. 1955). Hence, this testimony, even if admissible, does not support a finding of conspiracy.

Nor does the testimony of Mr. Oreck, in which he related the conversation he had with Mr. Payne in 1968, after being notified that Whirlpool would not renew the original contract, support a

finding of conspiracy. Oreck testified that Payne told him, "I *think* our other customer got to the head of the company." (A. 175.)

Oreck was not asked and his direct testimony did not indicate the basis for Mr. Payne's opinion. However, on cross-examination Mr. Oreck admitted that Mr. Payne did not know the reason for the termination, but was merely making an assumption as to the reason. (A. 437-439.)

Thus, the testimony of David Oreck with respect to his conversations with Payne, while inadmissible because Payne lacked the authority to bind Whirlpool, much less Sears, does not support a finding of conspiracy in any event. Rather, it clearly discloses that the evidence upon which plaintiff relied, and upon which the finding of the jury was based, was nothing more than sheer speculation and conjecture which the jury should not have ever been permitted to consider.

Excluding the inadmissible testimony of Mr. Oreck in which he related his conversations with Mr. Payne, the record in this case discloses that Sears is a stockholder of Whirlpool and one of its officers serves on the Whirlpool board (A. 323, 333-335); that it is Whirlpool's largest customer and sole customer for vacuum cleaners. It discloses that when the Oreck arrangement was first set up it authorized the use of its tools to make vacuum cleaners for Oreck and it never rescinded that authorization (A. 330, 332, 474, 656-657, 862-863), that during the course of the relationship between Whirlpool and Oreck, Oreck requested and Whirlpool did not obtain CSA approval on the vacuum cleaners it sold to Oreck and which Oreck was selling in Canada, while the vacuum cleaners that Whirlpool sold to Sears had such approval (A. 118-119, 150-151, 154-155, 416-418); that Oreck requested that Whirlpool sell it a private label line of vacuum cleaners and Whirlpool refused (A. 262-263, 634) and that Oreck requested Whirlpool to prepare certain special packaging and Whirlpool declined. (A. 599 *et seq.*)

The record also reveals that Sears did not even know of the requests by Oreck for CSA approval, private label vacuum cleaners, or special packaging, or that Whirlpool did not comply with Oreck's requests. Finally the record discloses that Sears at no time complained about Whirlpool's sales to Oreck or made any requests or suggestions with reference thereto, and it discloses that Sears had nothing to do with the termination of Oreck. (A. 766 *et seq.*, 800-884.)

In short, the record discloses that Sears had a relationship with Whirlpool, and might be said to have the economic power to influence Whirlpool to terminate its relationship with Oreck. But it also reveals that Sears did not exercise that power. The record discloses no evidence of an agreement or conspiracy between Sears and Whirlpool with reference to any aspect of the Oreck relationship or the termination thereof.

Even considering the inadmissible testimony of Oreck relating to his conversations with Payne, all the record shows is that Sears felt that Oreck's mailings would give Whirlpool a bad name and that Payne surmised, contrary to the fact, that Sears was involved in the termination of Oreck. Hence, even considering this inadmissible evidence, the record falls far short of evidence of a conspiracy.

What the record does show is that Whirlpool entered into a relationship with Oreck which contemplated a certain method of distribution (A. 56-58, 640-641), that Oreck digressed from this method and began selling Whirlpool vacuum cleaners, which were designed for home use (Tr. 738), to hotels and commercial enterprises (A. 498, 578, 769), and then used the fact of these sales as a "come-on" to sell through direct mailing to consumers with mailers that were misleading and illegal and which reflected upon the good name of Whirlpool (PX 60); that Whirlpool served notice upon Oreck of the termination of the original agreement (DXI), and that when Mr. Oreck protested and requested additional time so that he would not lose his investment (A. 171-172, 176-177, Tr. 1433), the parties entered into

a new agreement which by its terms expired on December 31, 1971 (PX 44); that Whirlpool lived up to its agreement, while Oreck failed to pay its bill (A. 442-443), and that when the definitive term of the second agreement expired, Whirlpool carried through on the decision it made in 1968 to terminate its relationship with Oreck, more concerned with its good name than with whatever volume Oreck might generate through its misleading and illegal mailers. The record shows not conspiracy, but the termination of a relationship according to the provisions of a written agreement, a termination unilaterally made by Whirlpool.

Since the record contains no probative evidence of conspiracy and the verdict is based upon speculation and conjecture, it cannot stand. Reversal is required.

III.

PLAINTIFF HAS FAILED TO MEET ITS BURDEN OF PROOF CONCERNING DAMAGES.

There is still another reason why the judgment below cannot stand. Oreck was required to prove by competent evidence both that it was injured as a result of defendants' conduct and the amount of such alleged damage. *Jacobi* v. *Bache & Co., Inc.*, 377 F. Supp. 86, 93 (S. D. N. Y. 1974). *aff'd* 520 F. 2d 1231 (2d Cir. 1975), *cert. denied* 423 U. S. 1053, 46 L. Ed. 2d 642 (1976). It proved neither.

A. Plaintiff Failed to Prove Its Allegation That It Was in Fact Damaged.

The applicable test as to proof of the fact of damage where plaintiff claims that it was foreclosed from the marketplace is set forth in *Elder-Beerman Stores Corp.* v. *Federated Dept. Stores, Inc.*, 459 F. 2d 138, 148-149 (6th Cir. 1972), wherein the Court stated:

> "An essential element in attempting to establish the fact of damage because of exclusion from a specified source of supply is the lack of an alternative comparable substitute for the desired merchandise. United States v. Arnold, Schwinn & Co., 388 U. S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967); Hershey Chocolate Corp. v. Federal Trade Commission, 121 F. 2d 968 (3d Cir. 1941); Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F. 2d 283 (6th Cir. 1963)."

There is no such evidence in this case. On the contrary, the undisputed evidence reveals that there were over twenty manufacturers in the market producing, on average, more than 7,000,000 vacuum cleaners per year. (PX 107, 108.)

It also reveals that when Whirlpool discontinued manufacturing canister vacuum cleaners in 1968, Oreck obtained canisters from another manufacturer. (A. 410-411.) Likewise, after its agreement with Whirlpool expired in 1971, Oreck readily obtained another source of supply for upright vacuum cleaners, which it considered superior to those manufactured by Whirlpool. (A. 408-409.) Indeed, after 1971, Oreck continued to sell upright and canister vacuum cleaners, with ever increasing success. (A. 885-889.) Thus, the record discloses not only that there were alternative vacuum cleaner sources available to Oreck, but that they supplied Oreck with its requirements. Accordingly, as a matter of law, Oreck could not be, and as a matter of fact, it was not damaged by defendants' alleged acts, and for this reason too reversal is required.

B. Oreck's Evidence of the Amount of Its Alleged Damage Was Predicated Upon Guess and Speculation.

Although Oreck obtained another supplier and remained active in the vacuum cleaner business after 1971, it claims that it was nevertheless damaged because it would have sold more vacuum cleaners during the period 1972 through June 14, 1976 had Whirlpool remained its source of supply, than the

number of vacuum cleaners it actually sold during this period. (PX 193ff, A. 885-889.)

Even if this were true, the loss in volume of sales of vacuum cleaners would not have damaged Oreck. Oreck admitted that it had in the past and would have continued in the future to sell Whirlpool vacuum cleaners below cost and that it would have lost approximately $213,000 per year, or a total of almost $1,000,000 during the period from January 1, 1972 to June, 1976, had it sold the same number of vacuum cleaners in each of those years as it sold in 1971. (PX 193D.) Having conceded this fact, Oreck reasoned that it would have made up the loss and created a profit from the sale of residual items for the vacuum cleaners it claimed it did not sell. Residuals, according to Oreck, are dust bags and replacement parts. (A. 732.) It therefore, over defendants' objection, placed before the jury projections of its claimed loss of profits on residuals totaling $2,134,427. (PX 193B, C, E, F.)

In antitrust actions, while damages need not be proved with mathematic precision, and reasonable approximations are acceptable, damages may not be founded upon mere speculation or surmise. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368 (9th Cir. 1957), *cert. denied* 355 U. S. 835 (1957).

Plaintiff's evidence met no acceptable test of a reasonable approximation of damages and was too speculative to support a verdict.

In connection with Oreck's claimed damages with respect to "residuals," it should first be noted that the projections are premised on the assumption that had Whirlpool remained Oreck's supplier, Oreck would have sold as many vacuum cleaners in 1972 and each and every year thereafter as it sold in 1971. (PX 193.)

But Oreck introduced no evidence to support this assumption. Plaintiff's evidence revealed that the Whirlpool brand on

vacuum cleaners had no particular appeal to consumers and certainly no more appeal than other brands sold by Oreck. In fact, Oreck's evidence revealed that some of its customers wanted vacuum cleaners without the Whirlpool name on it and that, when Whirlpool refused to sell Oreck private label vacuum cleaners, one of Oreck's customers simply put its own label over that of Whirlpool's (A. 262-263, 634.) Moreover, David Oreck testified that his best customers were those who were familiar with Oreck, and not Whirlpool. (A. 303.) Hence, the fact that Whirlpool was not Oreck's source would hardly have concerned these customers or affected their purchases. Also, in view of the fact that the vacuum cleaners Oreck purchased from its new supplier were superior to those manufactured by Whirlpool (A. 408-409), it can only be concluded that they would have been more marketable, not less marketable, than Whirlpool vacuum cleaners. Again, the fact that Whirlpool was no longer Oreck's supplier lacks significance. In addition, the evidence revealed that Oreck had Whirlpool vacuum cleaners in stock in 1972 and as late as December, 1973. (A. 445-447.) If the Whirlpool brand had any significance to Oreck or Oreck's customers, and there was any demand for these vacuum cleaners, certainly Oreck would have sold them.

Finally, it should be noted that 1971 was Oreck's best year. During 1971 it sold over 78,000 vacuum cleaners. (PX 106.) In 1970 it sold 39,000 vacuum cleaners. It explained the substantial increase by the fact that in 1971 it tripled the volume of its advertising. (A. 382-383.) Although, it did not explain the drop in sales in 1972 to 27,600 vacuum cleaners by the fact that in 1972 it reduced its volume of advertising, the fact is and Mr. Oreck was compelled to admit on cross-examination that in 1972 Oreck did reduce its volume of advertising. (A. 445.)

Thus, while the record discloses that Oreck sold fewer vacuum cleaners in 1972 and following years than it did in 1971, there is no evidence that the drop in volume was due to the change of the supplier. All the evidence is to the contrary.

Just as the record contains no basis for concluding that Oreck's drop in sales in 1972 over 1971 was due to the change in its supplier of vacuum cleaners, so there is no basis for assuming that because sales in 1971 reached 78,000 units, sales each year thereafter would remain at the same level if Oreck's supplier had not changed. Such an assumption is contrary to the known working of the business world and is refuted by the evidence in the record. Moreover, the circumstances under which this evidence was received were extremely prejudicial to the defendants. Plaintiff, through the testimony of a Dr. Ritchin, sought to prove, not merely that Oreck's sales would have remained constant during the years following 1971, but that they would have increased in such proportion that the Court found the testimony of Dr. Ritchin unbelievable. (A. 660 *et seq.*) He therefore struck it. (Tr. 1165-1181.)

Then, instead of requiring the plaintiff to introduce proper evidence, if it could, to support its claim, the court, over objection of defendants, permitted Oreck to make projections of profits on residual sales based upon an assumption that during each year following 1971 Oreck would have sold the exact same number of vacuum cleaners it sold in 1971. (Tr. 1344-1346.)

Such assumption not only flies in the face of economic reality and is not supported by the facts, but the prejudice to defendants resulting from the court's action cannot be overstated. It is one thing to argue against and possibly convince the Court of impropriety of an assumption made by a witness. It is another thing to convince the court that his own assumption is invalid and improper. Defendants were unsuccessful in this regard and plaintiff was therefore permitted to project damages based upon two basic invalid assumptions: (1) that having sold 78,000 vacuum cleaners in 1971, Oreck would have sold the same number each year thereafter, and (2) that it did not retain this sales volume solely because Whirlpool was no longer its source of supply. Nor does the speculative nature of plaintiff's proof of damages stop

with these assumptions for the projections of lost profits resulting therefrom also fly in the face of simple economics and ignore the facts as shown in the record. They, too, are sheer speculation.

Oreck's witness, Mr. Sommer, an accountant, testified to Oreck's gross sales of "residuals" for the fiscal year ended June 30, 1972. (A. 730 *et seq.*) These sales included such diverse products as dust bags, motors, and what have you. (A. 732.) Sommer then added up the total number of vacuum cleaners sold by Oreck from 1964 to and including June 30, 1971. He divided the total sales for residuals during the one-year period by the total units sold during the eight-year period, and concluded that the average sale price of all residuals, whether they were motors or paper bags, was $4.21 per unit. He then took the landed cost of these residual items for the one-year period, concluded that the average cost per residual whether it was a paper bag or a motor was $2.13, deducted that figure from the average sale price and concluded that the net profit resulting from the sale thereof was $2.08 per unit. (PX 106E.) In determining Oreck's net profit on residuals, Sommer did not consider any of Oreck's expenses incurred in connection with the sale of residuals, such as advertising expenses, rent, salaries, etc. (A. 733, 749-750), and thus Sommer assumed that Oreck had no overhead in connection with the sale of residuals, another assumption that disregards simple economics and the facts in the record. Sommer next assumed that during the year 1972, and each year thereafter for fifteen years, Oreck would sell residuals with the same mix, *i.e.*, the same proportion of bags and motors, etc., that it sold in 1971, and that regardless of economic conditions and competition, it would make exactly the same average profit, $2.08 per unit, on each residual sold during each of the fifteen years. (PX 193C, F.)

On cross-examination he was forced to admit that during the period from 1971 to June, 1976 there was a 30% inflation factor which was not considered in his computations and that he did not know whether Oreck's costs had risen, or, if so,

whether Oreck had passed on the increases to its customers (A. 743-748.) He simply assumed that Oreck would always make a profit of $2.08 per unit average on all residuals it ever sold in the future because that is the profit he concluded was made by Oreck in 1971.

Sommer then took the judge's assumption that Oreck would sell 78,203 vacuum cleaners in 1972 and assumed that such sales would have generated 78,203 residual sales in 1973. Thus he multiplied 78,203 by his own assumption of a $2.08 profit, and came up with the resulting loss of profit on residual sales for 1973 of $162,975. He then assumed that in 1973, Oreck would sell another 78,203 vacuum cleaners, which, when added to the assumption made for 1972 of an equal number, resulted in an assumption that during these two years Oreck would have sold 156,406 vacuum cleaners, and that these sales in turn would have resulted in the sale of an equal number of residuals with a profit of $2.08 per unit and projected loss of profit of $325,950 for the year 1974. For 1975 he assumed that Oreck would have increased its residual sales another 78,203 units and added this number to the 156,406 residual sales assumed to have resulted from 1972 and 1973 vacuum cleaner sales, and came up with a total of 234,609 residual sales for 1975 and a projected loss of profit for that year of $488,925.

Sommer's computation for the period January 1, 1976 to June 14, 1976 was done in the same manner, assuming that Oreck would have sold roughly half of the number of residual items of previous years since the time period was roughly half a year. Thus Sommer arrived at a projected loss of profit for the period January 1 through June 14, 1976 of $298,787, or a total of $1,276,637 for the period 1972 through June 14, 1976. (PX 193B.)

Using the same method of calculating, he projected that during the following ten-year period June 15, 1976 to and including June 14, 1986, Oreck's projected lost profits on residual sales amounted to $5,948,806, which he discounted at 9% to

$4,230,016. (PX 193C.) The total projected loss of profits on residual sales from 1972 through 1986 presented to the jury is $5,506,653 ($1,276,637 plus $4,230,016). (PX 193C.)

Sommer then took the number of vacuum cleaners Oreck actually sold during each of the years 1972 through June, 1976 and assumed that during each of these years Oreck sold an equal number of residuals at an assumed profit of $2.08 per residual or a total of $661,230. (PX 193E.)

For the period following the trial, Mr. Sommer made his computations based upon the same assumptions as stated above. (PX 193F.) His exhibits showed that overall Oreck lost projected profits on sales of residuals through 1986 of $2,134,427, after credit for projected "actual" sales. (PX 193B, C, E, F.)*

At this juncture, it is important to note that Oreck's expert witness, Mr. Sommer, is a certified public accountant (A. 706-707), and that he testified to the number of residuals he assumed Oreck sold and the profit he assumed Oreck made on

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* This figure is computed as follows:

Projected residual sales		
1/1/72-6/14/76 (PX 193B)	$1,276,637	
6/15/76-6/14/86 discounted at 9% (PX 193C)	4,230,016	
Total		$5,506,653
Less:		
Projected actual residual sales		
1/1/72-6/14/76 (PX 193E)	$ 661,230	
6/15/76-6/14/86 discounted at 9% (PX 193F)	2,710,996	
Total		3,372,226
		$2,134,427

such residuals during the period of 4½ years before the trial, completely ignoring the fact that Oreck's books and records obviously showed the sales and profits it actually made. While under certain circumstances, and with proper foundation, assumptions are sometimes accepted in the courts, the defendants know of no case in which a court has accepted the assumptions made by a certified public accountant as to what is contained in the books and records of a company in lieu of this testimony of what those books and records actually show. Yet that is what the court accepted here over defendants' objection.

Oreck's projections fly in the face of economic reality. To assume that a company will sell the same number of units in one year that it sold in a prior year, and to extend that assumption for fifteen years, ignores the company's own operations and any changes which may take place in it; it ignores competition and the effect of competition on the company's sales, it ignores price and profit fluctuations. In short, it fails to deal with the actual state of the marketplace. Also, Oreck's evidence assumes that every year for fifteen years customers will buy bags, motors and other parts in exactly the same proportion. The record provides no basis for such an assumption and it is contrary to reality. Also, as previously noted, Sommer was permitted to ignore the actual number of residual sales and the profit actually made thereon by Oreck during the period from 1971 to the date of trial in mid-1976, and to place before the jury his assumption of what these sales and profits were. Plaintiff's evidence of damages constitutes the wildest speculation and cannot be the basis on which a jury should have been permitted to award damages.

While the plaintiff in an antitrust action is not required to prove its damages with absolute mathematical accuracy, it cannot, as did plaintiff here, indulge in theories that result in proof that is speculative, remote and uncertain. *Velasco Products Company* v. *Lloyd A. Fry Roofing Company,* 308 F. 2d 383, 391 (6th Cir. 1962), *cert. denied,* 372 U. S. 907 (1963); *Bigelow* v. *R. K. O. Radio Pictures,* 327 U. S. 251, 66 S. Ct.

574, 90 L. Ed. 652; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544; *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684.

The courts have not hesitated to reject evidence such as that offered by plaintiff or to reverse judgments based thereon. Thus, in *Volasco Products Co.* v. *Lloyd A. Fry Roofing Company, supra,* at 391, the Court held it was improper to project sales of asphalt saturated felt used in constructing roofs, on the basis of the sales of the mopping asphalt used in constructing the same roofs, absent proof that the two products always sold in a definite relationship to one another. Here, plaintiff's evidence with respect to damages assumed, without proof, that there would always be the same relationship between the sales of vacuum cleaners and residuals as the relationship computed by Sommer for the fiscal year ended June 30, 1972. It further assumed without proof that there would be the same proportion of each residual sold in every year that Sommer computed for the one year and finally, it assumed without proof that Oreck would always enjoy the same average net profit on the sale of residuals that Sommer contended it enjoyed.

Defendants, of course, recognize, as did the court in *Volasco,* that if a company sells two products, there will always be a relationship between the sales of the two products. But defendants contend, as the court in *Volasco* recognized, that these relationships change from time to time, that it cannot be assumed, as did plaintiff here, that they always remain constant. Projections based upon such an assumption are speculative, and hence invalid.

In *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F. 2d 934 (5th Cir. 1975), *reh. denied,* 509 F. 2d 758 (5th Cir. 1975), a retail liquor dealer brought an action under Section 1 against Coors, a brewer, which refused to sell plaintiff beer. Plaintiff, as Oreck here, had been selling Coors beer below cost as a "loss leader." Plaintiff claimed that because of Coors' refusal to sell,

plaintiff experienced a loss of sales of all other products at the store. On rehearing of a reversal of a verdict for plaintiff, the Court stated (509 F. 2d at 759):

> ". . . the root assumption of the damage calculation did not demonstrate the necessary causal relationship between the loss of Coors and the purported decline in gross sales. Demonstration of such a causal relationship is vital to a showing of actual injury."

In the case of *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F. 2d 1, 34 (9th Cir. 1960), *rev'd on other grounds*, 370 U. S. 19 (1962) the appellant alleged error in the admission by the trial court of certain evidence similar to that offered by plaintiff in the instant case. Plaintiff's expert witness had been permitted to testify as to the profits which plaintiff would have received in 1951, but for the refusal of defendant to deal with it, based on the 1949 and 1950 operating conditions of the plaintiff. As the Court stated, "this hypothetical question excluded any reference to conditions in the industry generally in any year, or even to operations of [plaintiff] Winckler & Smith in 1951." The Court held this evidence to be inadmissible, as being too speculative:

> We are completely satisfied that the question of appellees' damages, as presented to the jury, rested upon surmise, conjecture, and guess work, and that the amount found as damages was not logically or legally [inferable] from the facts in evidence before the jury. The expert opinion was a guess based on conditions contrary to fact. It was, in reply to the hypothetical question, too speculative to be admissible. (Citations omitted.)

In summary, Oreck failed to prove by competent evidence either the fact of damage or the amount of its alleged damage. The jury then could only speculate with respect to damages and a verdict based upon speculation cannot stand.

CONCLUSION.

For the reasons stated above the judgment of the trial court must be reversed.

Wherefore, Whirlpool Corporation and Sears, Roebuck and Co., pray that the judgment of the trial court be reversed, and that this cause be remanded to the trial court with instructions to enter judgment notwithstanding the verdict in favor of Whirlpool and Sears and against Oreck Corporation. Alternatively, the errors in the admission of Oreck's conversations with John Payne on the conspiracy issue, the errors in the admission of Oreck's damage evidence, and the trial court's erroneous substitution of its own opinion as to Oreck's projected post-1971 sales in place of the testimony of witnesses, all of which was prejudicial to defendants, compels the granting of a new trial.

Respectfully submitted,

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STATE OF ILLINOIS, COUNTY OF COOK. } ss. Steven Magiszine being first duly sworn, deposes and says that he served two copies of the Joint Brief and one copy of Joint Appendix (2 volumes) and Book of Exhibits in the above entitled cause, as per statute herein made and provided, on

Mr. Malcolm A. Hoffman
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and also filed the required number of copies of the above with the U. S. Court of Appeals, Second Circuit

this 25th day of March, A. D. 1977

Steven Magiszine

Subscribed and sworn to before me this 25th day of March, A. D. 1977

Leonard B. Boudin
Notary Public.

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